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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/776,729	02/10/2004	John G. Noelke	2634.001	2818
21917	7590	07/11/2005	EXAMINER	
MCHALE & SLAVIN, P.A. 2855 PGA BLVD PALM BEACH GARDENS, FL 33410			EPPS, TODD MICHAEL	
			ART UNIT	PAPER NUMBER
			3632	

DATE MAILED: 07/11/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/776,729

Applicant(s)

NOELKE ET AL.

Examiner

Todd M. Epps

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
 - If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
 - If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
 - Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 10 February 2004.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-6 is/are pending in the application.
- 4a) Of the above claim(s) 7-8 is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-6 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 10 February 2004 is/are: a) ☐ accepted or b) ☒ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date 2/4/2004.
- 4) ☒ Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: _____.

DETAILED ACTION

This is the first Office Action for serial number 10/776,729, Comfort Enhancer for a breathing apparatus, filed on February 10, 2004.

Election/Restrictions

Restriction to one of the following inventions is required under 35 U.S.C. 121:

- I. Claims 1-6, drawn to subcombination, classified in class 248, subclass 75.
- II. Claims 7-8, drawn to combination, classified in class 606, subclass 1+.

The inventions are distinct, each from the other because of the following reasons:

Inventions II and I are related as combination and subcombination. Inventions in this relationship are distinct if it can be shown that (1) the combination as claimed does not require the particulars of the subcombination as claimed for patentability, and (2) that the subcombination has utility by itself or in other combinations (MPEP § 806.05(c)). In the instant case, the combination as claimed does not require the particulars of the subcombination as claimed because combination is able to perform as a stand. The subcombination has separate utility such as can be used as a light stand.

During a telephone conversation with Michael A. Slavin on 6/29/05, a provisional election was made without transverse to prosecute the invention of group I, claims 1-6. Affirmation of this election must be made by applicant in replying to this Office Action. Claims 7-8 are withdrawn from further consideration by the examiner, 37 CFR 1.141(b), as being drawn to a non-elected invention.

Drawings

The drawings are objected to as failing to comply with 37 CFR 1.84(p)(4) because reference character "34" has been used to designate both thumb screw and bi-pod fixture. Corrected drawing sheets in compliance with 37 CFR 1.121(d) are required in reply to the Office action to avoid abandonment of the application. Any amended replacement drawing sheet should include all of the figures appearing on the immediate prior version of the sheet, even if only one figure is being amended. Each drawing sheet submitted after the filing date of an application must be labeled in the top margin as either "Replacement Sheet" or "New Sheet" pursuant to 37 CFR 1.121(d). If the changes are not accepted by the examiner, the applicant will be notified and informed of any required corrective action in the next Office action. The objection to the drawings will not be held in abeyance.

Claim Rejections - 35 USC § 112

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter, which the applicant regards as his invention.

Claims 1-6 contain the trademark/trade name CPAP. Where a trademark or trade name is used in a claim as a limitation to identify or describe a particular material or product, the claim does not comply with the requirements of 35 U.S.C. 112, second paragraph. See *Ex parte Simpson*, 218 USPQ 1020 (Bd. App. 1982). The claim scope

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is uncertain since the trademark or trade name cannot be used properly to identify any particular material or product. A trademark or trade name is used to identify a source of goods, and not the goods themselves. Thus, a trademark or trade name does not identify or describe the goods associated with the trademark or trade name. In the present case, the trademark/trade name is used to identify/describe CPAP and, accordingly, the identification/description is indefinite.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1, and 3-5 are rejected under 35 U.S.C. 103(a) as being unpatentable over U.S. Patent number 2,997,242 to Grosholz. Grosholz discloses a base (11), a post (10, and 13) having a top end (fig. 1), a bottom end (fig. 1) and being adjustable in length (fig. 1), a post (10) adapted to be removably attached to base (11), a first hose clamp (fig. 1) slidably affixed to post (10), a bracket (21) adapted to be connected to top end of post (13), a spring (39) attached to bracket (21), a cantilever arm (22) adapted to extend from fastener normal, and a second hose clamp (35) adapted to be adjustably affixed to cantilever arm (22). Grosholz fails to teach a bracket including a pulley mounted to rotate in a plane parallel with post (13), and a cantilever arm (22) with a

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spring (39) attached to pulley biasing the rotation. However, Grosholz discloses a cross beam (41) with a groove in the middle, which functions like a pulley, where a spring is attached one end, and a bolt (40) where the other end of spring is attached. It would have been obvious to one ordinary skill in the art at the time the invention was made to have specified cross beam as pulley.

Regarding claim 3, Grosholz teaches a post (10, and 13) having a plurality of sections, and being telescopically connected to each other.

Regarding claim 4, Grosholz discloses a bracket (21) having spaced apart opposed sides with an axle connecting sides, but fails to disclose a pulley rotating about axle. It would have been obvious to one ordinary skill in the art at the time the invention was made to have a bolt (40) replaced by cross beam (41) shown on the other end of the spring as it functions like a pulley.

Regarding claim 5, Grosholz discloses a cross beam (41) with a groove in the middle, which functions like a pulley, where a cross beam (41) having a circumference, a coil spring (39) disposed about circumference, and a bolt (40) where the other end of spring is attached to bracket. It would have been obvious to one ordinary skill in the art at the time the invention was made to have specified cross beam as pulley.

Claim 2 is rejected under 35 U.S.C. 103(a) as being unpatentable over Grosholz in view of U.S. Patent number 6,019,484 to Seyler. Grosholz fails to disclose a base including a plate with an aperture in plate sized to slide along post, a first fastener adapted to block aperture to lock plate at a position on post, and a bi-pod fixture

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mounted on plate, at least two legs adapted to connected to bi-pod fixture normal to post. Attention is directed to the Seyler reference, which teaches a base including a plate with an aperture in plate sized to slide along post, a first fastener adapted to block aperture to lock plate at a position on post, and a bi-pod fixture mounted on plate.

Accordingly, it would have been obvious to one ordinary skill in the art at the time the invention was made to have a base of Grosholz with a bi-pod fixture as taught by Seyler wherein doing so would provide ease to adjust the plate at any height to mounted on an object.

Allowable Subject Matter

Claim 6 would be allowable if rewritten to overcome the rejection(s) under 35 U.S.C. 112, 2nd paragraph, set forth in this Office action and to include all of the limitations of the base claim and any intervening claims.

In regards to claim 6, the prior art fails to teach a spring stop mounted on pulley.

Conclusion

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

U.S. Patent number 2,043,813 to Saladino

U.S. Patent number 2,748,236 to Landis

U.S. Patent number 2,978,217 to Gunderson

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U.S. Patent number 3,464,411 to Martinez

U.S. Patent number 4,238,096 to Dvorachek

U.S. Patent number 5,836,361 to Koncsek

U.S. Patent number 6,516,802 to Hansen

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Todd M. Epps whose telephone number is 571-272-8282. The examiner can normally be reached on M-F (7:30-4:30).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Robert Olszewski can be reached on 571-272-6788. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Todd M. Epps
Patent Examiner
A.U. 3632
July 1, 2005

